



IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1651

SEATRAN SHIPBUILDING CORPORATION

And

POLK TANKER CORPORATION

Petitioners,

v.

SHELL OIL COMPANY, et al,

Respondents.

**BRIEF OF SHELL OIL COMPANY IN REPLY TO
BRIEF FOR THE FEDERAL PARTIES ON
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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June 8, 1979

On May 18, 1979, Respondent Shell Oil Company ("Shell") filed a brief in opposition to the pending petition for a Writ of Certiorari. Shell files this brief today to reply to the contention of the Federal parties that the United States District Court for the District of Columbia Circuit lacked jurisdiction to review the November 22, 1977 Order of the District Court. The Federal Parties first raised this contention in their petition for rehearing en banc, some 15 months after a notice of appeal from the District Court's Order was filed. The Court of Appeals found no merit in the Federal parties' argument, and, indeed, it has none.

Shell initiated this lawsuit not merely to bar the STUYVESANT from domestic trade but to challenge the defendants' claim of authority to waive permanently trading restrictions on vessels built with construction-differential subsidy ("CDS"). To that end, Shell alleged in the complaint that defendants' actions were contrary to the Merchant Marine Act, 1936. *Verified Complaint*, ¶ 33, p. 9. Shell prayed for a judgment declaring that defendants lacked authority to waive permanently trading restrictions and for an order permanently enjoining defendants from exercising such authority. *Verified Complaint*, p. 10. On November 22, 1977, the District Court entered an Order which granted summary judgment against Shell and its co-plaintiffs on these claims. (Appendix A, hereto). On November 30, 1977, the District Court implemented its decision by directing entry of *final* judgment. (Appendix B, hereto). Fundamental precepts of American jurisprudence, as well as common sense, indicate that appellate review of the November 22, 1977 Order was proper.

The District Court certified the November 22, 1977 Order for appeal under Rule 54(b) of the Federal Rules of

Civil Procedure. The November 22 Order, granting summary judgment on the discrete question of the defendants' legal authority and finally denying Shell's claims for a declaratory judgment and permanent injunction, plainly resolved separate claims for relief by Shell. These claims can be, and were, decided independently of the claims considered on remand. Rule 54(b) is properly invoked in such cases. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436-37 (1956); see *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 742 (1976).

Contrary to the Federal parties' contention, the remand proceeding ordered by the District Court could not have afforded Shell the ultimate relief it sought on the claims the District Court certified for appeal under Rule 54(b). The remand would not in any way affect the District Court's holding that the defendants had authority to waive permanently trading restrictions. Similarly, the remand could not have resulted in a permanent injunction against defendants. At most, defendants would have been enjoined from waiving restrictions on one vessel at one point in time. Shell would, consequently, be confronted with the prospect of participating in an endless series of proceedings in which Petitioners and other subsidized operators sought permanent entrance to the domestic trade. Even had the defendants concluded on remand not to grant the waiver requested for the STUYVESANT, Shell would have continued to litigate before the Court of Appeals the question of defendants' authority to contemplate permanent waivers.

There can, thus, be no question that, absent the remand, the District Court's November 22, 1977 Order would have been a final order appealable under 28 U.S.C. § 1291. While the remand arguably makes a Rule 54(b)

certification necessary, it hardly makes such a certification improper.*

Regardless of certification under Rule 54(b), the District Court's Order of November 22, 1977 was independently reviewable under 28 U.S.C. §1292(a)(1). This provision permits appeal from interlocutory orders which "touch on the merits" of a claim by denying requests for injunctions or declaratory judgments. *Switzerland Cheese Assoc., Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966); see *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 744-45 (1976). The granting of summary judgment against Shell, and the consequent final denial of declaratory and injunctive relief, falls within this provision.

Several misstatements of fact by the Federal parties deserve brief comment. The Federal parties, no doubt searching for social significance, represent that there is a shortage of tanker capacity to transport Alaskan crude oil and that, consequently, the Court of Appeals' decision may cause Alaskan oil to remain in the pipeline. *Brief for the Federal Parties*, at 8, 9 n.11. These statements are not supported by the record, and they are simply wrong. They are also at odds with statements the Federal parties made to the Court in opposing review of the decision permitting Alaskan oil to be transported to the Virgin Islands in foreign flag vessels. There, the Federal parties stated that

* Indeed, the Rule 54(b) certification in this case was probably superfluous. The Court granted summary judgment on all claims before it. The remand was not designed to develop facts bearing on the Court's ruling on the legal issues presented. Under such circumstances, immediate appellate review under 28 U.S.C. §1291 is appropriate. *E.g.*, *Paluso v. Mathews*, 573 F.2d 4, 7-8 (10th Cir. 1978) (on rehearing); *Cohen v. Perales*, 412 F.2d 44, 48 (5th Cir. 1969), *rev'd on other grounds*, 402 U.S. 389 (1971); see *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949) (28 U.S.C. §1291 should be given practical rather than technical construction).

unsubsidized United States Flag vessels "may be denied employment as a consequence of the court of appeals' decision." *American Maritime Association v. Blumenthal*, No. 78-1287, *Brief for the Federal Respondent in Opposition*, at 4 n.6. Moreover, SOHIO, owner of approximately 50 percent of all Alaskan crude, has just recently terminated charters for the MANHATTAN and the OVERSEAS JUNEAU, two large oil tankers which had been transporting Alaskan crude. The combined capacities of these two tankers are approximately equal to the capacity of the STUYVESANT.

In its Brief in Opposition to the Petition, Shell observed that this case did not present an issue worthy of review. It concerns but the first instance in the history of the Merchant Marine Act, 1936 in which a vessel built with CDS entered the domestic trade, and the legal issue decided below was resolved by long standing doctrines of statutory construction. The Federal parties' Brief does not provide any reason why the Petition should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

SHELL OIL COMPANY,
Plaintiff,

v.

JUANITA M. KREPS, et al.,
Defendants.

C.A. No. 77-1645

ALASKA BULK CARRIERS, INC.,
and TRINIDAD CORPORATION,
Plaintiffs,

v.

JUANITA M. KREPS, et al.,
Defendants.

C.A. No. 77-1647

ORDER

Upon consideration of the cross-motions for summary judgment, the respective points and authorities in support thereof and in opposition thereto, the arguments of counsel in open Court, and the entire record herein, and in accordance with the Memorandum Opinion of the Court issued of even date herewith, it is, by the Court, this 22nd day of November, 1977,

ORDERED, ADJUDGED, AND DECREED, that, for the reasons articulated on pages 23-26 of the Court's Memorandum Opinion of even date herewith, and because the Secretary failed to consider the competitive effects of her decisions, the decisions of the Secretary of Commerce to accept CDS repayment by means of a 20-year promissory note and to waive permanently domestic trading restrictions on the S.S. STUYVESTANT in exchange therefor be,

and the same hereby are, declared to be arbitrary and capricious and an abuse of discretion in violation of 5 U.S.C. § 706(2)(A); and it is

FURTHER ORDERED, ADJUDGED, AND DECREED, that plaintiffs' motions for summary judgment be, and the same hereby are, granted insofar as they seek the declaratory relief ordered in the preceding paragraph; and it is

FURTHER ORDERED, that defendants' and defendant-intervenors' motions for summary judgment be, and the same hereby are, denied insofar as they seek judgment on plaintiffs' claim that the operative decisions with respect to the STUYVESTANT were made without notice in 1975 and kept secret until 1977, and this claim will therefore remain before the Court; and it is

FURTHER ORDERED, that defendants' and defendant-intervenors' motions for summary judgment be, and the same hereby are, granted with respect to all of plaintiffs' claims not covered by the preceding ordered paragraphs; and it is

FURTHER ORDERED, that this case is hereby remanded to the Secretary for reconsideration, in accordance with the Memorandum Opinion issued of even date herewith, of her decisions with respect to the STUYVESTANT; and it is

FURTHER ORDERED, that the Secretary shall complete the aforesaid reconsideration within 45 days of the date hereof; and it is

FURTHER ORDERED, that counsel for all parties shall be present in Courtroom 11 on November 30, 1977 at 9:30 A.M., for a status call in the above-captioned matter.

CHARLES R. RICHEY

Charles R. Richey
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

SHELL OIL COMPANY,
Plaintiff,

v.

JUANITA M. KREPS, et al.,
*Defendants.*Civil Action
No. 77-1645ALASKA BULK CARRIERS, INC.,
and TRINIDAD CORPORATION,
Plaintiffs,

v.

JUANITA M. KREPS, et al.,
*Defendants.*Civil Action
No. 77-1647**ORDER**

Upon consideration of the motion of plaintiffs Alaska Bulk Carriers, Inc. and Trinidad Corporation to amend this Court's Order of November 22, 1977, which plaintiff Shell Oil Company joined in today at the status call held herein, and it appearing to the Court that all plaintiffs seek leave to dismiss from this case the claim remaining before the Court that the Secretary's decisions with respect to the STUYVESTANT were arbitrary, capricious, and an abuse of discretion because the operative decisions were made in 1975 and kept secret until 1977, and it appearing to the Court that this remaining claim is superfluous and would afford plaintiffs no greater relief than the remand which has already been ordered by this Court, and it further appearing that no further issues remain before the Court and that there is no need for any further proceedings in this case at this time, and it

further appearing that there is no reason to delay the entry of final judgment herein, it is, by the Court, this 30th day of November, 1977,

ORDERED, that plaintiffs' motion to amend this Court's Order of November 22, 1977, be, and the same hereby is, granted; and it is

FURTHER ORDERED, that plaintiffs' remaining claim be, and the same hereby is, dismissed; and it is

FURTHER ORDERED, that final judgment be, and the same hereby is, entered with respect to all claims decided by the Court in its Order and Memorandum Opinion of November 22, 1977.

CHARLES R. RICHEY

Charles R. Richey
United States District Judge